

IT ALL BEGAN IN HAWAII

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The first substantive chapter in *THE QUIET REVOLUTION IN LAND USE CONTROL* was all about Hawai'i, where "it all began."¹ Indeed, Hawai'i still has the most centralized state land use controls in the United States. In fact, no state has adopted its sweeping state-wide zoning, which takes precedence over all local government land use controls in all but four percent of the state's land area. What distinguishes Hawai'i from other states, and what make these land controls possible, is that Hawai'i has only four local governments, its four counties, and that there is a history of central control, in part as a result of the state's monarchical antecedents (until 1898, Hawai'i was more or less a kingdom ruled by a Queen and her council).

I. THE HISTORICAL AND INSTITUTIONAL CONTEXT

The preoccupation with land management in Hawai'i goes well back in history, arguably dating from the semi feudal relationship between certain Hawai'ian monarchs with their chief nobles (ali'i), to whom they parceled out land in ahupua'a. The land usually extended from the uplands to the sea.² Thus, the roots of the statewide regulatory system are historical, which does much to explain the relatively easy acceptance of a strong regulatory regime without significant legal challenge to management and disposal policies that existed before a modern system of public land policy evolved. Indeed, this public land policy began to emerge shortly after what has been described as the chaotic conditions following the virtual destruction of ancient Hawai'i's social and economic patterns in the middle of the nineteenth century.³ The result was a climate that heavily favored

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1. FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 5 (President's Council on Environmental Quality, 1971).

2. JON CHINEN, *THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848* 3-6 (Univ. of Hawai'i Press 1958).

3. LEGISLATIVE REFERENCE BUREAU, *PUBLIC LAND POLICY IN HAWAII: AN HISTORICAL ANALYSIS* (1969), available at <http://lrbhawaii.info/lrbrpts>

centralized land use management and control at the public sector level, which is just what occurred in the middle decade of the twentieth century.

In the years preceding 1961, when the State of Hawai'i passed its Land Use Law, the interests of the private landholding oligarchy and the centralized state government converged out of concern for the threat to agricultural land, the mainstay of the major private interests and the single most important factor in the Hawai'ian economy.⁴ Hawai'i's economic "boom" was beginning, along with land speculation and development. Presumably, the state's four counties were unequal to the task of dealing with the problems generated by this rapid economic growth, having comparatively little planning expertise and few land use controls.⁵ The stage was thus set for the passage of Hawai'i's landmark Land Use Law, which resulted in the "zoning of Hawai'i" by a state agency in order to contain sprawl and preserve agricultural land. It is this law and its progeny upon which most commentators have chosen to dwell. This is but a tip of the iceberg, however. Hawai'i now labors under a plethora of local and state regulations that affect the use of land, public and private. Both traditional and unique zoning and subdivision schemes, requiring multiple permits and conditions, all tied to tiers of local plans, vie for prominence with a host of regulations and standards issued pursuant to federal statutes that, directly or indirectly, further restrict the use of land. Hawai'i's statewide Land Use Law and the state plans that guide its implementation set the basic land use patterns for both private and public land in Hawai'i. They also provide the context for county land use regulations. Additionally, all four counties have local land use powers and vigorously exercise them not only through traditional zoning districts but also through a host of special and mixed uses and districts, some of which "overlay" traditional districts for historic, conservation, or aesthetic purposes. How these affect traditional private development "rights" is an increasingly important issue. So is the challenge of proliferating county plans into traditional local land control ordinances.

II. STATE LAND USE CONTROL IN HAWAI'I

Hawai'i is unique among the fifty states in its comprehensive state-wide land use controls. Hawai'i's land use commission ("LUC"), manages a system of land district classification, distinct

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4. BOSSELMAN & CALLIES, *supra* note 1.

5. PHYLLIS MYERS, ZONING HAWAII: AN ANALYSIS OF THE PASSAGE AND IMPLEMENTATION OF HAWAII'S LAND CLASSIFICATION LAW 19-20 (1976).

from, but overlaying county zoning schemes.⁶ Actions by state agencies, which are required for the approval of the multitude of permits required for virtually any large land use project, must, theoretically, meet the requirements of the statutory state comprehensive plan.

A. Hawai'i's Land Districts

Land in Hawai'i is divided into four use districts: urban, rural, agricultural, and conservation.⁷ The LUC is responsible for grouping contiguous parcels of land into these districts according to the present and foreseeable use and character of the land.⁸ The urban district includes lands that are in urban use and will be for the foreseeable future.⁹ The rural district is designed for land with small farms and low-density residential lots.¹⁰ The agricultural district consists of land theoretically used for farming and ranching,¹¹ and after recent amendments, includes a new, statutorily-defined sub-district, "Important Agricultural Lands" ("IAL").¹² The LUC, Hawai'i's four counties, and private landowners are currently identifying and classifying IALs.¹³ Finally, the conservation district includes land in areas formerly classified as forest and water reserve zones, open spaces, water sources, wilderness, scenic, and historic areas.¹⁴ Land within the conservation district is further divided into five sub-zones: Protected, Limited, Resource, General, or Special.¹⁵

Presently, about forty-eight percent of Hawai'i's land area is designated conservation, forty-seven percent agricultural, five percent urban, and less than half a percent rural.¹⁶ Currently, this last classification is expanding, converting land from the agricultural districts, to accommodate rural residential

6. HAW. REV. STAT. § 205-1 (2011).

7. *Id.* § 205-2.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* § 205-43.

13. For a brief overview of the land use law and its districts, see DAVID KIMO FRANKEL, PROTECTING PARADISE: A CITIZEN'S GUIDE TO LAND & WATER USE CONTROLS IN HAWAII 4-7 (1997).

14. HAW. REV. STAT. § 205-2 (2011).

15. HAW. CODE R. § 13-5-10 (LexisNexis 2011).

16. See Haw. State Dep't of Bus., Econ. Dev. & Tourism, Land Use Comm'n Records, *Table 6.04 – Estimated Acreage of Land Use Districts, By Island*, THE STATE OF HAWAII DATA BOOK 2007 (Dec. 31, 2006), available at <http://hawaii.gov/dbedt/info/economic/databook/db2007/section06.pdf> (providing a breakdown of the land uses on each island). Land classified as rural may increase as landowners increasingly use it for small residential estates formerly permitted in the agricultural district.

development in the wake of the lengthy litigation that occurred over large-lot resort/residential development on agricultural-zoned land on the island of Hawai'i between 1995 and 2005.¹⁷ Given the steady demand for residential, commercial, and resort/residential real estate in Hawai'i, coupled with the comparatively tiny (approximately five percent) percentage of land classified urban or rural, landowners expend much time and energy seeking to reclassify agricultural (and occasionally conservative) land into one of the other development-oriented districts.

This state-level district classification system is akin to a zoning scheme. As described below, Hawai'i's four counties retain most of the regulatory authority to further classify land in the urban district for typical urban uses. Only low-density residential use is permitted (jointly by the LUC and the counties) in the rural and agricultural districts, and virtually no economically beneficial uses at all are permitted in the conservation district, much of which is publicly owned. In sum, the counties control uses within the urban district, the counties and the state jointly control uses in the agricultural and rural districts, and the state controls uses in the conservation district.¹⁸

Permitted uses in agricultural districts include: the cultivation of crops, orchards, and forests; animal husbandry; fish farming; wind farms; solar energy facilities (in land designated to have limited farming potential); scientific monitoring stations not equipped for use as a residence; agricultural tourism on working farms; and open area recreational facilities. Employee housing, mills, storage facilities, and other buildings related to farming are permitted for "[b]ona fide" agricultural uses.¹⁹ Land currently or previously used by a sugar or pineapple plantation may contain housing for employees or former employees. Construction of single-family homes is also permitted on lots in the agriculture district subdivided before June 4, 1976.²⁰ The subdivision of agricultural land, especially prime agricultural land with high quality class A or B soil, is subject to special requirements, such as that the use of the land be primarily agricultural.²¹ Aside from specified

17. *Kelly v. 1250 Oceanside Partners*, Civ. No. 00-1-0192K (3d Cir. Ct. Haw. Sept. 9, 2003) (Findings of Fact, Conclusions of Law, Order Regarding Trial on Count IV of the Fifth Amended Complaint). *Kelly v. 1250 Oceanside Partners*, No. 00-1-0192K, 2006 WL 4077352 (Haw. Cir. Ct. Mar. 14, 2006) (Fourth Amended Final Judgment). The litigation was settled by the parties before the Hawai'i Supreme Court had the opportunity to rule on the lawfulness of such residential development and the meaning of "farm dwelling."

18. HAW. REV. STAT. § 205-2 (2011).

19. *Id.* § 205-4.5.

20. *Id.*

21. *Id.* §§ 205-5.4(b), 205-4.5(f).

exceptions, residential uses beyond “farm dwellings” are theoretically prohibited. In practice, however, all four of Hawai'i's counties have for decades permitted large-lot residential subdivisions so long as there is some demonstrable agricultural use on the lot or on common open space.²² This is tolerated largely because of inadequate statutory and common law definitions of “farm buildings” and agricultural use. Golf courses and golf driving ranges, however, are not permitted “open space recreational” uses unless approved by a county before July 1, 2005.²³

A LUC survey of land parcels in the agricultural division of Hawai'i County revealed that seventy-eight percent are smaller than five acres, averaging 1.24 acres in size—altogether only 89,095 acres.²⁴ By statute, the agricultural district specifically includes lands “that are not used for, or that are not suited to, agricultural [uses],” such as lava flow land and desert, lending credence to the suspicion that in some quarters, particularly with the demise of plantation agriculture, the district has become a *de facto* open space district.²⁵

The rural districts may contain low-density residential uses, agricultural uses, golf courses and related facilities, and public utilities.²⁶ The density of dwellings in rural districts generally must not exceed one per half acre, though variances may be granted for “good cause.”²⁷ Although only a tiny fraction of state land is now classified as rural, that is changing as landowners take advantage of the 2008 amendments to the Land Use Law, and seek to reclassify agricultural land to rural for large-lot residential development projects. This new reclassification has caused increasing state and county resistance to all but truly

22. See, e.g., the factual context in *Save Sunset Beach Coal. v. City and Cnty. of Honolulu*, 78 P.3d 1 (Haw. 2003) (detailing how plaintiffs brought an action to prevent a residential development on lands previously designated for agricultural use).

23. HAW. REV. STAT. § 205-4.5(d) (2011).

24. Rory Flynn, *Seeing Through the Fog of 'Fake Farms,'* HAW. REPORTER, Jan. 30, 2007, available at <http://www.hawaiireporter.com/seeing-through-the-fog-of-fake-farms/123>. See also Adrienne Suarez, *Avoiding the Next Hokulia: The Debate over Hawaii's Agricultural Subdivisions*, 27 U. HAW. L. REV. 441 (2005) (discussing the struggle to balance Hawai'i's finite resources between housing for a growing population and agricultural needs). For a decidedly contrary view, see Nathan Roehrig, *Urban Type Residential Communities in the Guise of Agricultural Subdivisions*, 25 U. HAW. L. REV. 199 (2002).

25. HAW. REV. STAT. § 205-2(d) (2011). See Norman Cheng, *Is Agricultural Land in Hawaii "Ripe" for a Takings Analysis?*, 24 U. HAW. L. REV. 121, 140-41 (2001) (discussing the ease by which a petitioner can utilize agricultural land for other purposes).

26. HAW. REV. STAT. § 205-5 (2008).

27. *Id.* § 205-5(c).

agricultural uses in the large agricultural district following several long and costly lawsuits challenging residential use on land classified as agricultural.²⁸

Once so classified by the LUC, urban districts are wholly controlled by the counties; all uses permitted by county ordinances or zoning rules are permitted in urban districts.²⁹

Conservation districts are specially protected by the state, and are governed by the State Department of Land and Natural Resources ("DLNR"). The state seeks to "conserve, protect, and preserve the important natural resources of the [s]tate through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare."³⁰ Consequently, virtually no structural development is permitted in the conservation district (except an occasional single-family house, as noted below), a change from the practice of the LUC in the 1960s and 1970s when recreational facilities, resorts, and a college campus were developed on conservation district land.³¹

The DLNR further divides the conservation district into subzones that permit different uses: (1) Protective; (2) Limited; (3) Resource; (4) General; or (5) Special.³² The Protective subzone is intended to protect valuable watersheds, historic sites, and the ecosystems of native species. A few activities, like removing dead non-native or small trees, do not require a permit (removing a hazardous tree, on the other hand, requires submitting documentation). Most uses, however, will require documentation of the need and/or a permit. Permitted uses include nature reserves and scenic areas; restoring fishponds; agriculture and a single-family residence when such use was "historically, customarily, and actually found on the property"; public facilities like transportation systems, water systems, and recreational facilities; and the maintenance, replacement, operation, and renovation of existing structures. A subdivision (not to be confused with residential development) may be approved when it "serves a public purpose and is consistent with the objectives of the [Protective] subzone."³³

The Limited subzone is intended to prevent uses where

28. See *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985 (Haw. 2006) (evidencing the public backlash against large-scale developers moving into previously designated agricultural land); see also *Save Sunset Beach Coal.*, 78 P.3d 1 (showing that the local population is against proposed residential development on agriculturally designated land).

29. HAW. CODE R. § 15-15-24 (LexisNexis 2011).

30. HAW. REV. STAT. § 183C-1 (2008).

31. Madalyn Purcell, *Residential Use of Hawaii's Conservation District*, 14 U. HAW. L. REV. 633, 649-50 (1992).

32. HAW. CODE R. § 13-5-10 (LexisNexis 2011).

33. *Id.* § 13-5-22.

“natural conditions suggest constraints on human activities” to prevent erosion, floods, or build up in areas vulnerable to natural disasters.³⁴ It includes all the permitted land uses in the Protective category. Additional permitted land uses are a small amount (less than one acre) of agriculture with a permit, or a larger amount with both a permit and a management plan. In addition, botanical gardens, erosion control devices, landscaping, and single-family residences in floodplains or coastal high hazard areas that conform to flood control regulations are permitted.³⁵

The Resource subzone consists mainly of parkland, land suitable for lumber, and land suitable for recreational outdoor activities like hiking and fishing, offshore islands, and wet sand beach areas.³⁶ Permitted uses include astronomy facilities, commercial forestry, artificial reefs, mining, and single-family homes, in addition to the uses permitted in the Protective and Limited subzone.

The General subzone is dedicated to open space where urban use is not desirable, but without defined conservation uses.³⁷ This includes open space (but no golf courses) and other land uses, “which are consistent with the objectives of the general subzone.”³⁸

Finally, the Special subzone is for areas “possessing unique developmental qualities.”³⁹ This classification allows for a unique use on a specific site. Examples include Koko Head’s Sea Life Park special subzone for recreational, education, and commercial purposes; Kaneohe’s Haka site for cemetery purposes; and Honolulu’s Kapakahi Ridge for nursing or convalescent home purposes.⁴⁰

In agricultural and rural districts, a landowner who wishes to make use of the land for “certain unusual and reasonable uses” in a manner not enumerated by statute may petition for a special permit from the relevant county planning commission (for land under fifteen acres) or from both the county planning commission and the LUC (for land over fifteen acres).⁴¹ Although the counties and the state share jurisdiction over land use in the rural and agricultural districts, it is each county’s responsibility to enforce the State Land Use Law in both.⁴²

34. *Id.* § 13-5-12.

35. *Id.* § 13-5-23.

36. *Id.* § 13-5-15.

37. *Id.* § 13-5-14.

38. *Id.* § 13-5-25.

39. *Id.* § 13-5-15.

40. *Id.* Exhibit 2.

41. HAW. REV. STAT. § 205-6 (2011).

42. *Id.* § 205-12, Opinion of the Att’y Gen., 70-22. *See also* Cnty. of Haw. v. Ala. Loop Homeowners, 203 P.3d 676 (Haw. Ct. App. 2009) (recognizing that it is the county’s responsibility to enforce the state agricultural land use law),

Alternatively, a conservation district landowner wishing to make any use of his or her land must submit a Conservation District Use Application ("CDUA") to the Department of Land and Natural Resources ("DLNR").⁴³ The special permit and CDUA processes are described below. Besides permits, a landowner also has the option of requesting his or her land be reclassified from one district to another (a so-called "boundary amendment") or, within the conservation district, from one sub-zone to another, to allow for his or her proposed use. The Hawai'i legislature has also enacted new legislation that fast-tracks and streamlines reclassification of agricultural land to the other districts in exchange for designating other land Important Agricultural Land ("IAL"). Finally, a landowner may petition the LUC for a "declaratory order" interpreting its rules regarding the permissible uses of the landowner's land. These processes are also described below.

B. The Special Use Permit Process

Within agricultural and rural districts, Hawai'i's Land Use Law specifically permits a landowner to seek a "special permit" for uses otherwise not permitted. The county planning commissions have jurisdiction over such special use permits—for "certain unusual and reasonable uses"—within these districts for parcels less than fifteen acres in size.⁴⁴ For parcels more than fifteen acres, or land designated IAL, special permits are subject to the approval of both the relevant county planning commission and the LUC.⁴⁵ Criteria for determining that a use is "unusual and reasonable" are: (1) the use is not contrary to the objectives of the LUC statute and administrative rules (which are not explicitly stated in the statute); (2) the use would not "adversely affect" surrounding property; (3) the use would not "unreasonably burden public agencies" to provide infrastructure such as roads and sewage systems; (4) whether "unusual conditions, trends, and needs have arisen since district boundaries and rules were established"; and (5) whether the land in question is "unsuited for the uses permitted within the district."⁴⁶ The State Attorney General has also opined, "[the purpose of a special use permit is to] provide a landowner relief in exceptional situations that would not change the essential character of the district nor be inconsistent therewith, and is basically analogous to a variance."⁴⁷ The fifth

vacated, 235 P.3d 1103 (Haw. 2010).

43. HAW. CODE R. § 13-5-30 (LexisNexis 2011).

44. HAW. REV. STAT. § 205-6 (2011).

45. HAW. CODE R. § 15-15-95 (LexisNexis 2011).

46. *Id.*

47. *Neighborhood Bd. No. 24 v. State Land Use Comm'n*, 639 P.2d 1097,

factor is illustrated by the large amount of lava field land being classified within the "agricultural" district, a classification theoretically designated for land with a "high capacity" for cultivation. In the agricultural district, special permits may be issued for land uses supporting ecotourism related to the preservation of threatened or endangered species. Moreover, although the counties generally prescribe uses in the rural district, there is one circumstance under which the LUC has jurisdiction: a landowner seeking a variance from the statutory minimum lot size requirement must also apply for a special permit from the LUC.⁴⁸

To approve a special use permit, the relevant county planning commission must determine, by majority vote, that the use would promote the effectiveness and objectives of the Land Use statute.⁴⁹ The commission may impose conditions upon issuance of the special use permit, including, for example, time limits.⁵⁰ Overuse is discouraged, and the Hawai'i Supreme Court has specifically held that such permits may not be used to circumvent the need for a boundary amendment, particularly for large and intrusive projects.⁵¹ However, the same court permitted a golf course by special permit, even though the Land Use Law specifically forbade them in the agricultural district where the applicant planned to develop it.⁵²

Several cases have further defined what is permitted under the land use law. In *Curtis v. Board of Appeals*, a cellular phone tower was not considered a "communications equipment building" or a "utility line," both of which would be permitted uses of right in an agricultural district.⁵³ Noting that such an expansionary reading of the term "utility line" would frustrate the State Land Use Law's goals of protection and rational development, the Hawai'i Supreme Court found telecommunications towers and

1102 (Haw. 1982) (recognizing the undesirability of "unlimited use of the special permit to effectuate essentially what amounts to a boundary change" that "would undermine the protection from piecemeal changes to the zoning scheme guaranteed landowners by the more extensive procedural protections of boundary amendment statutes.").

48. HAW. REV. STAT. § 205-2(c) (2011).

49. *Id.* § 205-6(c).

50. *Id.*; HAW. CODE R. §§ 15-15-95, 96 (LexisNexis 2011).

51. *Neighborhood Bd. No. 24*, 639 P.2d at 1102.

52. *Maha'ulepu v. Land Use Comm'n.*, 790 P.2d 906 (Haw. 1990). See Douglas Ushijima, *Maha'ulepu v. Land Use Comm'n.: A Symbol of Change; Hawaii's Land Use Law Allows Golf Course Development on Prime Agricultural Land by Special Use Permit*, 13 U. HAW. L. REV. 205 (1991) (explaining that the Maha'ulepu court allowed the development of a golf course by special permit on land in an agricultural district where golf courses were specifically forbidden).

53. *Curtis v. Bd. of Appeals*, 978 P.2d 822, 835 (Haw. 1999); HAW. REV. STAT. § 205-4.5(a)(6) (2011).

antennas “novel and unique use[s]” requiring a special permit absent enumeration in the statute.⁵⁴ Later, however, in *T-Mobile USA, Inc. v. County of Hawai‘i Planning Commission*, the court allowed as of right a “stealth antenna” concealed completely within a false chimney and with all related equipment kept in a garage.⁵⁵ In distinguishing *Curtis*, the court pointed out the entire structure would be concealed in a chimney and garage, both structures being permitted uses, and that the concealed antenna would not undermine the State Land Use Law’s objectives.⁵⁶

C. The Conservation District Use Application Process (“CDUA”)

The DLNR controls uses within the conservation district. In order for a landowner to make use of his or her conservation land, the landowner must go through the DLNR’s CDUA permitting process. First, however, the owner must go through the county Special Management Area (“SMA”) review process. Through this review process, the county must either: (1) determine that the proposed land use is outside the SMA; or (2) determine that the proposed land use is exempt. Otherwise, the landowner must include the SMA permit in the CDUA application.

Under the next step of the CDUA process, the landowner must include basic information about himself or herself, a description of the land, plans for the proposed use including maintenance and management plans, a filing fee, and a draft environmental assessment of the proposed use.

Finally, the landowner must indicate for which of the following permits he or she is applying: (1) a departmental permit; (2) a board permit; (3) an emergency permit; (4) a temporary variance; (5) a site plan approval; or (6) a management plan. The type of permit required is determined by the sub-zone in which the land is located and the use proposed.⁵⁷ For example, a landowner with land in the protective sub-zone who wishes to post signs should apply for a site plan approval, while a landowner with land in the limited sub-zone who wishes to create botanical gardens must have a management plan in place and obtain a board permit.

A public hearing is required for any application involving land uses for commercial purposes, changes in identified uses, uses in the protective sub-zone, and proposed land uses affecting the public interest.⁵⁸ The applicant has the burden of demonstrating that the proposed land use is “consistent with the purpose of the

54. *Curtis*, 978 P.2d at 835.

55. *T-Mobile USA, Inc. v. Cnty. of Haw. Planning Comm’n*, 104 P.3d 930, 938 (Haw. 2005).

56. *Id.* at 941.

57. Haw. Code R. § 13-5-30 (LexisNexis 2005).

58. *Id.* § 13-5-40.

conservation district" and sub-zone in which the use will occur, will comply with Coastal Zone Management statutes and rules, will not cause "substantial adverse impact to existing natural resources" within the region or community, will at the very least preserve "natural beauty and open space characteristics" of the land, and fulfill the general catch-all requirement that the proposed use not materially harm "public health, safety, and welfare." Subdivision of land is not allowed to increase the "intensity" of land uses in the conservation district.⁵⁹

D. Conservation District Sub-Zone Reclassification

If the use to which a landowner wishes to put conservation land would otherwise be prohibited within the relevant sub-zone, the landowner may request to have the land reclassified to a sub-zone that permits the use. The conservation district sub-zone reclassification process requires the landowner to propose an administrative rule change, which is processed as an amendment to the DLNR's regulations. To consider a reclassification request, the DLNR requires: information on the landowner and property, including geographic, climatic, hydrological, and biological characteristics; information on historic properties located in the area; scenic or visual resources; infrastructure evaluations; and a review of the property's characteristics in relation to sub-zone objectives.

E. District Boundary Amendment

A landowner denied a use within a designated district may petition the LUC to reclassify the land into a more intensive use district, e.g., from conservation or agriculture to urban, through a District Boundary Amendment ("DBA"). The LUC processes all DBAs for conservation land, as well as for parcels larger than fifteen acres in urban, rural, and agricultural districts. The relevant county planning commission processes applications for DBAs of parcels less than fifteen acres in the rural, urban, and agricultural districts. After proper notice and the filing of the petition and fees, the LUC holds a "contested case" hearing.⁶⁰ Thus, DBAs are generally considered to be non-legislative acts, though whether such a conclusion would or should be applied to DBAs resulting from five-year reviews of state boundary classifications is dubious, as this would reflect a policy determination of a more general nature than a DBA petition.⁶¹

59. *Id.* § 13-5-30(c).

60. *See Town v. Land Use Comm'n*, 524 P.2d 84, 96 (Haw. 1974) (noting the LUC procedure to hold a contested case hearing).

61. *See, e.g., Fasano v. Bd. of Cnty. Comm'rs*, 507 P.2d 23 (Or. 1973)

The LUC uses the following criteria in determining whether to reclassify the subject land: whether reclassification is in accordance with the goals, objectives, and policies of the Hawai'i State Plan (discussed *infra*); district standards; impact upon habitat, historical, natural, or cultural resources, particularly the cultural resources of Native Hawai'ians;⁶² consequences for natural resources relevant to Hawai'i's economy; whether there is a commitment of state funds; employment opportunities and economic development; housing opportunities for all income levels; the county general plan and all community or community development plans relating to the land subject to the reclassification petition; and the representations and commitments made by the petitioner. The LUC must also closely scrutinize reclassifications of intensively cultivated agricultural lands under the recently enacted Important Agricultural Lands statute.⁶³ The LUC may approve the reclassification if it will not impair nearby agricultural production or is necessary for urban growth. The overall standards for approving DBAs is, by a clear preponderance of the evidence, whether the DBA is reasonable, does not violate the statute that governs land districts, and is consistent with the Hawai'i State Plan.⁶⁴ Six affirmative votes from the nine-member LUC are necessary to approve a DBA, and the LUC may choose to impose conditions that run with the land. The LUC may impose sanctions for failing to observe conditions, including down-zoning land to "uphold [] the intent and spirit" of the statute and "assure substantial compliance with representations made by the petitioner."⁶⁵ Thus, for example, the LUC has threatened to return land classified as urban to its former agricultural classification for failure of the landowner-developer to commence development in a timely manner.⁶⁶ Whether it may legally do so depends largely upon how one views the nature of the boundary amendments. Cases and commentators are by and large critical of such "rezonings" merely for failure to proceed with a particular project.⁶⁷

(analyzing the fine line of treating cases as judicial versus legislative).

62. See *Ka Pa'akai o ka 'Aina v. Land Use Comm'n*, 7 P.3d 1068 (Haw. 2000) (discussing the obligations of the LUC).

63. HAW. REV. STAT. § 205-17 (2011).

64. *Id.* §§ 205-4, 205-16.

65. *Id.* § 205-4(g); see also *Lanai Co. v. Land Use Comm'n*, 97 P.3d 372 (Haw. 2004) (analyzing the power of the LUC).

66. Taylor Hall, *Big Island Project May Get Second Chance*, HONOLULU ADVERTISER, June 6, 2009, at B-5.

67. See, e.g., *Scrutton v. Cnty. of Sacramento*, 79 Cal. Rptr. 872 (Cal. Ct. App. 1969) (noting the limits of power in rezoning); but see the much-critical Illinois case of *Goffinet v. Christian Cnty.*, 357 N.E.2d 442 (Ill. 1976) (finding that conditional rezoning is not invalid on its face).

The LUC approves most petitions for DBAs. Every five years, the Office of Planning ("OP") is required to review all DBAs in the state,⁶⁸ an obligation which it has rarely met, particularly in the past fifteen years; OP last undertook such a review in 1991. This lack of overall boundary review has probably contributed to the LUC's tendency to focus on individual parcels to the detriment of a statewide overview.

Several Hawai'i cases have further interpreted and elaborated upon the LUC's obligation under the Land Use Law. First, under *Kilauea Neighborhood Association v. Land Use Commission*, the LUC must make specific findings with regards to each criterion for reclassifying district boundaries when approving a District Boundary Amendment.⁶⁹ Second, according to *Ka Pa'akai o ka 'Aina v. Land Use Commission*, in approving a District Boundary Amendment, the LUC must take into account the impact of reclassification on native Hawai'ian rights. Specifically, the Hawai'i Supreme Court held that the LUC may not delegate to a landowner its constitutional and statutory obligation to protect native Hawai'ian customary rights, and must make specific findings and conclusions regarding:

- 1) the identity and scope of valued cultural, historical, or natural resources in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised;
- 2) the extent to which those resources, including traditional and customary native Hawaiian rights, will be affected or impaired by the proposed action; and
- 3) the feasible action, if any, to be taken by the Land Use Commission to reasonably protect Native Hawaiian rights if they are found to exist.⁷⁰

The *Ka Pa'akai o ka 'Aina* decision has been criticized for misunderstanding the responsibility of the LUC in the District Boundary Amendment process. A DBA provides a landowner with considerable discretion in future uses of the land, making it often impossible to speculate about the effects of a DBA on native Hawai'ian, or any other rights or resources, given the variety of possible uses of land that may result from such a Boundary Amendment. Moreover, many such uses are impossible without county concurrence or approval.

68. HAW. REV. STAT. § 205-18 (2008).

69. *Kilauea Neighborhood Ass'n v. Land Use Comm'n of State of Hawaii*, 751 P.2d 1031, 1034-35 (Haw. Ct. App. 1988).

70. *Ka Pa'akai o ka 'Aina*, 7 P.3d at 1084.

F. Declaratory Orders

Any interested person may also petition the LUC to issue a declaratory order.⁷¹ A declaratory order indicates how the LUC would interpret its own rules with regard to a particular parcel and use within it. After receiving a petition for a declaratory order, the LUC may deny the petition, issue a declaratory order, or set a hearing, which may or may not be of the contested case variety required for DBAs.⁷² The LUC will not issue declaratory orders for questions that are speculative or hypothetical, for petitions in which the petitioner would not have standing in a judicial action, for questions affecting the interests of the LUC in pending litigation, or questions beyond the LUC's jurisdiction.⁷³

G. Important Agricultural Lands

The state legislature created a major new land sub-classification, Important Agricultural Land ("IAL"), via amendments to the Land Use Law in 2005. Recognizing a "substantial interest" in the survival of the agricultural industry in Hawai'i, these amendments sought to provide incentives to landowners to preserve lands capable of producing high yields for agricultural purposes, even if the lands were not currently put to such use.⁷⁴ The designation is thus a carrot to landowners to preserve large blocks of contiguous fertile land from creeping urbanization and fragmentation. Among other stated aims, the law seeks to "ensure that uses on important agricultural lands are actually agricultural uses" and attempts to avoid their development as large-lot residences with little actual agricultural use, as illustrated by the so-called "fake farm" phenomena that brought luxury homes to lands designated for agriculture.⁷⁵ The first IAL designation by the LUC occurred in March of 2009, when approximately 3770 acres on Kaua'i, owned by a subsidiary of Alexander & Baldwin, were reclassified.

IAL designation criteria include whether the land is already used for farming, the quality of the soil, the sufficiency of water and infrastructure (including convenience of transportation of agricultural goods), and whether the land is associated with traditional native Hawai'ian agriculture, such as taro farming.⁷⁶ The designation is fairly flexible; an IAL candidate need not meet every criterion. Indeed, a parcel meeting *any* of the criteria must

71. HAW. CODE R. § 15-15-98 (LexisNexis 2005).

72. *Id.* § 15-15-100.

73. *Id.* § 15-15-102.

74. HAW. REV. STAT. § 205-41 (2008).

75. *Id.* § 205-43.

76. *Id.* § 205-44(c)(4).

receive “initial consideration.” The LUC also requires a certification issued by the Department of Agriculture as to the quality of the land to be designated IAL; at a minimum, the land must have “sufficient quantities of water to support viable agricultural production” and “contribute[] to maintain[ing] a critical land mass important to agricultural productivity.”

The classification process begins with either a petition from a landowner or a county action. A two-thirds majority of the LUC is required to designate lands IAL at the request of a landowner.⁷⁷ In the second category, the county must make designations based on maps and in consultation with landowners and various interest groups. The county departments must include the position of the owners of the land to be designated in their final recommendation, along with comments from other interest groups, the viability of existing agribusinesses, and its conformity with the criteria. The county council ultimately makes the decision, which is reviewed by the LUC.⁷⁸ Lands designated as IALs are eligible for incentive programs, including grant assistance, tax offsets, enhanced access to water, and agricultural training.⁷⁹

IALs are subject to extra considerations and requirements for special use permits, rezoning, and district boundary amendments. Like land areas greater than fifteen acres, such actions pertaining to IALs require processing by both the LUC and the relevant county.⁸⁰ The state must find that the public benefit from the proposed action is justified by a need for additional land for nonagricultural purposes, that the action will not harm existing agricultural enterprises, and that the proposed action has “no significant impact upon the viability” of neighboring agricultural operations that may share marketing or infrastructure costs. Absent landowner request, the IAL designation may also be removed if, through no fault of the landowner, there is no longer a sufficient supply of water to allow profitable farming.⁸¹ IAL maps must be reviewed at least once per decade but not more often than once every five years.

In 2008, incentives to classify land as IAL commenced in earnest with the adoption of additional statutory amendments. The amendments enact the incentives noted above, expanding on the promised tax credits, providing for the state to guarantee loans by commercial lenders to agricultural producers, and mandating priority processing for agricultural permits. Moreover, the

77. HAW. CONST. art. XI, § 3 (requiring a two-thirds majority for reclassification or rezoning action).

78. HAW. REV. STAT. §§ 205-47, 49 (2008).

79. *Id.* § 205-46.

80. *Id.* § 205-3.1.

81. *Id.* § 205-50(g).

amendments allow the building of farm dwellings, but only if used exclusively by employees who actively work on the land and immediate family members. Such dwellings cannot occupy more than five percent of the total IAL or fifty acres, whichever is less. No residential subdivisions are permitted, but farmers may cluster dwellings together to preserve agricultural space. These portions of the 2008 amendments are uncontroversial.

Of greater importance to land use is a reclassification land swap. In exchange for landowner designation of large tracts of contiguous arable land, the LUC will by a declaratory order facilitate the reclassification of a smaller amount of agriculture district land to urban, conservation, rural, or a combination thereof. The land to be so reclassified need not be contiguous with the proposed IAL, though it must be in the same county. This reclassification may apply up to fifteen percent of the land; thus, at least eighty-five percent of the land must be designated IAL. If the owner seeks less than fifteen percent of the land to be reclassified rural, urban, or conservation, the landowner earns a "credit" for the difference. The credit is valid for ten years but may not be transferred to another person.⁸²

Procedurally, a landowner petitioning to reclassify land IAL may, within that petition, seek the above-described land swap reclassification. The LUC will review the suitability of the reclassification to urban, rural, or conservation, and may include "reasonable conditions" in the declaratory order. If it fails to approve either reclassification, the IAL designation, or the land swap designation, the petition is denied entirely. Additionally, land swap reclassifications to the urban district must be consistent with the relevant county general development plan.

What distinguishes the land swap from a more conventional DBA, besides a presumably greater propensity on the part of the LUC for approval, is that the new law contains no provision for a contested case hearing. This accelerates the reclassification process by avoiding the delays associated with the public review process otherwise required under the ordinary system for DBAs. Land swap reclassification approval is conditioned only upon meeting the suitability requirements and a two-thirds vote by the LUC.⁸³ The LUC possesses "the sole authority to interpret the adopted map boundaries delineating the [IAL]."⁸⁴ Of course, land so reclassified is still subject to permitting requirements associated with the reclassified district, county plans, and county zoning restrictions.

82. *Id.* § 205-45(h)(2).

83. *Id.* § 205-45(e)(3).

84. *Id.* § 205-49(c).

Land use is restricted by more than just district boundaries, however. State agencies making land use decisions must conform their rulings to the overall theme, goals, objectives, and policies of the comprehensive state plan, enacted as a statute.

III. THE STATE PLAN: A NEW DIRECTION SINCE QR

Hawai'i is unique among the fifty states in having converted its state general plan into a statute, Act 100, which made it the first state to enact a comprehensive state plan. The writing of the plan into the statutory code transformed what is in most states a policy document into a set of preeminent legal requirements.⁸⁵ Its passage by the Ninth State Legislature in 1978 represented not only a milestone for the state—indeed, the governor ranked it second only to the State Constitution in importance—but also for the nation.⁸⁶ Notably, a State Land Use Law amendment to Land Use Commission standards for deciding boundary amendments, providing no such boundary amendment can be adopted unless it is in conformance with the State Plan, adds considerably to the State Plan's legal significance in Hawai'i.⁸⁷

A. *The State Plan*

The culmination of efforts having begun in 1975, the State Plan is the product of three years of intense work by the then-Department of Planning and Economic Development (now the Department of Business, Economic Development & Tourism, or "DBEDT"), that included an inventory of goals, objectives, and policies; a statewide household survey; technical studies; issue papers; public workshops and hearings; the creation of a policy council; and intense lobbying in the legislature. Its major areas of concentration were: population; the economy (tourism, defense and other federal spending, the sugar and pineapple industries, diversified agriculture, and potential new areas like motion picture production); the physical environment; facility systems (water supply, transportation, energy, public utility facilities, solid and liquid waste disposal); and socio-cultural advancement (housing, health, education, social services, leisure activities, public safety, and cultural heritage).

The Hawai'i State Plan is divided into three major parts:

85. See Todd Eddins & Jerilynn Hall, *Kaiser Hawaii Kai Development Co. v. City and County of Honolulu: Zoning by Initiative in Hawaii*, 12 U. HAW. L. REV. 181 (1990) (analyzing the Hawai'i Supreme Court's ruling. The court held that initiative proposals adopted by the electorate to downzone two tracts of land from residential to preservation were invalid).

86. George R. Ariyoshi, *Hawaii 2050*, HAWAII BUSINESS (May 2006), <http://www.hawaiiibusiness.com/Hawaii-Business/May-2006/Hawaii-2050/>.

87. HAW. REV. STAT. § 205-16 (2008).

overall theme, goals, objectives and policies; planning coordination and implementation; and priority guidelines.⁸⁸ The Findings and Purposes statement of the Act sets out the rationale for the plan⁸⁹:

The legislature finds that there is need to improve the planning process in this State, to increase the effectiveness of government and private actions, to improve coordination among different agencies and levels of government, to provide for wise use of Hawaii's resources and to guide the future development of the State.⁹⁰

The purpose of this chapter is to set forth the Hawaii state plan that shall serve as a *guide* for the future long-range development of the State; identify the goals, objectives, policies and priorities for the State; *provide a basis* for determining priorities and allocating limited resources, such as public funds, services, human resources, land, energy, water, and other resources; improve coordination of federal, state, and county plans, policies, programs, projects, and regulatory activities; and to establish a system for plan formulation and program coordination to provide for an integration of all major state, and county activities.⁹¹

The all-important implementation strategy is accomplished through several mechanisms. To begin, a policy council of state, county, and public representatives was established to advise the legislature and reconcile conflicts between the agencies and plans described below. DBEDT provides technical assistance to the policy council, particularly by performing statewide policy analysis and reviewing recommendations on all state plan matters. Twelve state functional plans⁹² define, implement, and conform to the overall theme, goals, objectives, policies, and priority guidelines of

88. HAW. REV. STAT. §§ 226-2, 226-51, 226-101 (2008).

89. See Kent M. Keith, *The Hawaii State Plan Revisited*, 7 U. HAW. L. REV. 29 (1985) (reviewing the origin and content of the state plan, the state plan process, the amendments to the state plan made by the 1984 legislature, and the uses of the plan); Michael Dowling & James Fadrowsky, III, *Dolan v. City of Tigard: Individual Property Rights v. Land Management Systems*, 17 U. HAW. L. REV. 193 (1995) (analyzing relevant parts of the *Dolan* court's reasoning for its decision and examination of a "new" test for exactions, surveying the initial response to *Dolan* by various federal and state courts, and endeavoring to predict the impact of the decision of future litigation, especially within the context of the land management system in Hawai'i); Allan F. Smith, *Uniquely Hawaii: A Property Professor Looks at Hawaii's Land Law*, 7 U. HAW. L. REV. 1 (1985).

90. HAW. REV. STAT. § 226-1 (2008).

91. *Id.*

92. State functional plans include: education, employment, health, housing, human services, agriculture, conservation lands, energy, historic preservation, recreation, tourism, and transportation. The ten plans that were adopted in 1984 differ from the current twelve plans. HAW. REV. STAT. § 226-52(a)(3) (2008).

the State Plan.⁹³ County general plans (general and development) must indicate desired population and physical development patterns for each county and region within the county, and further define the overall theme, goals, objectives, policies, and priority guidelines of the State Plan.⁹⁴ State programs must conform to both the State Plan (and apply its priority guidelines) and to approved state functional plans.⁹⁵ Therefore, while the county general plans must *take into account* state functional plans and vice-versa, both functional plans and county general plans must *conform* to the State Plan.⁹⁶ Finally, priority guidelines address areas of statewide concern.⁹⁷ For example:

Protect and enhance Hawaii's shoreline open spaces and scenic resources.⁹⁸

Utilize Hawaii's limited land resources wisely, providing adequate land to accommodate projected population and economic growth needs while insuring the protection of the environment and the availability of the shoreline, conservation lands and other limited resources for future generations.⁹⁹

Encourage urban growth primarily to existing urban areas where adequate public facilities are already available or can be provided with reasonable public expenditures, and away from areas where other important benefits are present, such as protection of important agricultural land or preservation of lifestyles.¹⁰⁰

The part of the State Plan dealing with implementation, and especially conformance, is the most significant component for the purpose of land use control. This is so because the State Plan, in theory, requires "conformance" to its policies, goals, objectives, and priority guidelines across virtually the whole spectrum of state land use actions. However, in 1984, the legislature defined conformance as a weighing of the overall theme, goals, objectives, and policies and a determination that an action, decision, rule, or state program is both consistent with the overall theme and fulfills one or more of the goals, objectives, or policies.¹⁰¹ Under this new definition, conformance becomes relatively easy to accomplish, and nearly impossible to contest. This is particularly true now that "guidelines" have replaced "directions" in "statutory directions." "Guidelines" now means merely a "stated course of action which is

93. *Id.*

94. *Id.* § 226-52(a)(4).

95. *Id.* § 226-59.

96. *Id.* §§ 226-55, 226-52(a)(4).

97. *Id.* § 226-101.

98. *Id.* § 226-104(b)(13).

99. *Id.* § 226-104(b)(12).

100. *Id.* § 226-104(b)(1).

101. *Id.* § 226-2.

desirable and should be followed unless a determination is made that it is not the most desirable in a particular case; thus a guideline *may be deviated from without penalty or sanction.*"¹⁰²

B. State Activities

Nevertheless, the State Plan requires that all state programs be in conformance with its theme, goals, objectives, policies and priority guidelines as well as with its twelve functional plans: "[t]he formulation, administration, and implementation of state programs shall be in conformance with the overall theme, goals, objectives, and policies and shall utilize as guidelines the priority guidelines contained within this chapter, and the state functional plans approved pursuant to this chapter."¹⁰³ These state programs include, but are not limited to, those programs involving coordination and review; research and support; design, construction, and maintenance; services; and regulatory powers. State programs that exercise coordination and review functions include, but are not limited to, the state clearing-house process, capital improvements program, and coastal zone management program. State programs that exercise regulatory powers in resource allocation include, but are not limited to, the land use and management programs administered by the Land Use Commission and Board of the Department of Land and Natural Resources. State programs "shall" further define, implement, and conform to the overall theme, goals, objectives, and policies, and also utilize as guidelines both the priority guidelines contained within this chapter, and the state functional plans approved pursuant to the statute.¹⁰⁴

Certain programs relating to budget review and land use control are particularly singled out as "implementation mechanisms" for conformance with the overall theme, state plan goals, and objectives and policies (but are only to use as guidelines the priority guidelines of the Act, and the state functional plans approved pursuant to this chapter). These are program appropriations, capital improvement project ("CIP") appropriation, budgetary review and allocation, "land use decision making processes of state agencies" (such as the Land Use Commission and the Board of the Department of Land and Natural Resources), and "all other regulatory and administrative decision-making processes of state agencies."¹⁰⁵

Thus, the state's major land use decision-making body, the

102. *Id.*

103. *Id.* § 226-59.

104. *Id.* § 226-52(a)(5).

105. *Id.* § 226-52(b)(2).

LUC, is to some extent bound by the State Plan and its subordinate functional plans in land reclassification (e.g., DBA) decisions. Interim guidelines for the use of the LUC were drafted, but failed to become law. As the LUC boundary amendment guidelines set forth in amendments to the State Land Use Law automatically terminated in the summer of 1980, the LUC is without specific statutory guidance in the matter of land use boundary amendments until the Land Use Law is further amended. The functional plans implementing Act 100 now provide a measure of guidance, executing as they do Act 100's statutory directives.

C. The Functional Plans

While broad policies are sketched in the State Plan, it is the functional plans to which state and county agencies were to originally look for guidance. The State Plan provides for the preparation of twelve such plans addressing different policy areas: education, employment, health, housing, human services, agriculture, conservation lands, energy, historic preservation, recreation, tourism, and transportation.¹⁰⁶ Ten plans were adopted in 1984, by concurrent resolution.¹⁰⁷ Five plans were revised in 1989,¹⁰⁸ and seven plans were revised in 1991.¹⁰⁹ The functional plans must define, implement, and conform to the overall theme, goals, objectives, policies, and priority guidelines contained within the statute. In the same paragraph, Act 100 directs that "county general plans and development plans shall be taken into consideration in the formulation of state functional plans."¹¹⁰ The State Plan also sets out basic requirements for the functional plans: "The functional plan shall identify priority issues in the functional area and shall contain objectives, policies, and implementing actions to address those priority issues."¹¹¹

Originally, the responsibility for preparing each functional plan was assigned to named state agencies, such as the DLNR and the former DPED, but the duty of maintaining and creating guidelines for the revisions of the functional plans was transferred

106. Information obtained from the State of Hawaii Office of Planning, June 2, 2006.

107. Plans that were adopted in 1984 are: conservation lands, energy, higher education, health, historic preservation, housing, recreation, tourism, transportation, and water resources development. Since the amendments, water resources development is no longer a functional plan.

108. Plans that were revised in 1989 are education, employment, health, housing, and human services.

109. Plans that were revised in 1991 are agriculture, conservation lands, energy, historic preservation, recreation, tourism, and transportation.

110. HAW. REV. STAT. § 226-52(a)(3) (2008).

111. *Id.* § 226-55(b).

back to the Hawai'i Office of Planning from the Department of Budget and Finance in 2001.¹¹² The State Functional Plans have "languished" since they were last updated in 1991.¹¹³

All of the state functional plans have the same framework. Each plan has three chapters. Chapter I, the first five or so pages of each plan, is an introduction and is largely the same in each state functional plan. It follows a basic introduction with the purpose, role, theme, advisory committee, and review, revision, and coordination processes of the state functional plans.

Chapter II addresses the approach to the specific functional plan's issues. It consists of a long-term philosophy statement, an overview of the specific functional plan, the objectives and scope of the functional plan, the coordination of the specific functional plan with other state functional plans, and the issue areas addressed in the functional plan.¹¹⁴ For example, in the State Conservation Lands Functional Plan ("SCLFP"),¹¹⁵ Chapter II articulates the overall theme and goals of the Hawai'i State Plan, describes how further growth in the population and economy of Hawai'i is inevitable but must be balanced with Hawai'i's need to minimize the negative effects on the natural environment, and states what must be done to meet these statewide concerns. The brief overview indicates that the plan addresses issues concerning the aquaculture industry and continued efforts to broaden public use of natural resources and lands while protecting and preserving land from overuse. The objective of the SCLFP is to provide for a management program balancing the use and protection of the state's natural resources. The majority of the responsibility lies with the state, though federal, private, and county assistance will also play roles. The SCLFP is closely related to other state functional plans that are concerned with the use of natural resources and/or environmental protection, including the Energy, Health, Historic Preservation, and Recreation plans. These plans

112. SUSTAINABILITY TASK FORCE, HAWAII 2050 SUSTAINABILITY PLAN: CHARTING A COURSE FOR HAWAII'S SUSTAINABLE FUTURE (Jan. 2008) [hereinafter HAWAII 2050 SUSTAINABILITY PLAN], available at http://www.hawaii2050.org/images/uploads/Hawaii2050_Plan_FINAL.pdf.

113. *Id.*

114. Some functional plans, such as the Historic Preservation State Functional Plan (1991), do not have an overview, an objectives and scope section, or a section on the coordination with other state functional plans, in Chapter II. However, all state functional plans have the long-term philosophy statement and a main section on what issues are addressed in the specific functional plan.

115. DEP'T OF LAND AND NATURAL RESOURCES, THE HAWAII STATE FUNCTIONAL PLAN FOR HISTORIC PRESERVATION (1991), available at http://www.hawaiistateassessment.info/library/Hawaii_State_Functional_Plan_HistPres_1991.pdf (in accordance with HAW. REV. STAT. § 226 (2005)).

include many complementary as well as competing interests. The plan is then divided into three issue areas directly related to planning and management: (I) inventories of resources and background information and basic research; (II) management; and (III) education and public information.

Chapter III is the bulk of each functional plan. This chapter is particularly significant as it declares the objectives, policies, and implementing actions of the functional plan. Each issue area listed in Chapter III has several main objectives. Each objective has multiple related policies, and each policy has one or more corresponding implementation actions. For instance, in Chapter III of the State Conservation Lands Functional Plan, Issue Area I is first stated. Then the first of two objectives of Issue Area I are listed: establishment of databases for inventories of existing lands and resources. It is followed by the first of five policies within the section: develop and maintain a centralized statewide database of conservation areas and natural resources. A corresponding implementation action is then stated: develop a centralized land inventory and natural resource database in conjunction with the State Geographic Information System. A lead organization, assisting organizations, a start date, a total budget estimate, a target location, and comments are set forth with each implementing action.

D. County Plans

Finally, county general plans and development plans are integrated with state functional plans. The “[c]ounty general plans or development plans shall further define the overall theme, goals, objectives, policies, and priority guidelines” of the State Plan.¹¹⁶ “The formulation, amendment, and implementation of county general plans or development plans shall *take into consideration* statewide objectives, policies, and programs stipulated in state functional plans.”¹¹⁷ This directive is particularly critical to the county land use regulatory scheme, since most county land use control schemes are tied so directly to their general or development plans that land use changes made contrary to those

116. HAW. REV. STAT. § 226-52(a)(4) (2005).

117. *Id.* § 226-58(a). See also *Lum Yip Kee, Ltd. v. City & Cnty. of Honolulu*, 767 P.2d 815, 821 (Haw. 1989) (describing that where city council's action in amending development plans was consistent with policies and objectives of state functional plans, ordinance did not violate state planning act requirement that counties “take into consideration state functional plans in formulating and amending development plans.”). For an extended discussion of the relationship between county, general, and development plans in a different context, see David L. Callies & Calvert G. Chipchase, *Water Regulation, Land Use and the Environment*, 30 U. HAW. L. REV. 49 (2007).

plans are invalid. Thus, for example, in the City and County of Honolulu City Charter, a provision requires all local zoning and subdivision ordinances to conform to local development plans.¹¹⁸

All of these detailed development plan elements must further define the provisions of the State Plan and take into consideration statewide objectives, policies, and programs stipulated in state functional plans approved in consonance with this chapter. County general plans, and the more detailed development plans, are to: (1) be “formulated with input from the state and county agencies as well as the general public; (2) take into consideration the state functional plans; and (3) be formulated on the basis of sound rationale, data, analyses, and input from the state and county agencies and the general public.”¹¹⁹ For example, where a county council’s findings stated “that studies were made, public hearings were held, field investigations were conducted, public testimony was considered,” and findings were made that the amendment to the development plan was consistent with policies and objectives of the development and general plans, the ordinance did not violate the state planning act requirement that county development plans be formulated with “input from state and county agencies and the general public,” and on the basis of sound rationale, data, and analyses.¹²⁰ However, Act 100 also makes its own specific requirements with respect to both the manner of formulation and the contents of county general and development plans, providing “that any amendment to the county general plan of each county shall not be contrary to the county charter.”¹²¹

While there have been no substantive amendments to the state planning system or its plans since the 1990s, a Hawai’i 2050 task force was established to review the state plan and other fundamental components of community planning, and to develop recommendations on creating the Hawai’i 2050 Sustainability Plan for future long-term development of the state.¹²² The Hawai’i 2050 Sustainability Plan was submitted for review in early 2008.¹²³ Paralleling the studies that went into the process to develop the State Plan, the goals are divided into the economy; the physical environment; and physical, social, and economic well-being.¹²⁴ The Sustainability Plan is advisory only, but it contains a

118. HONOLULU, HAW., ORDINANCE § 6-1511 (2001), available at <http://www1.honolulu.gov/refs/rch/rc061511.pdf>.

119. HAW. REV. STAT. ANN. § 226-2 (LexisNexis 2005); *Kaiser Haw. Kai Dev. Co. v. City & Cnty. of Honolulu*, 777 P.2d 244 (Haw. 1989).

120. HAW. REV. STAT. ANN. § 226-58 (LexisNexis 2005); *Lum Yip Kee, Ltd.*, 767 P.2d at 815.

121. HAW. REV. STAT. § 226-58(a) (2008).

122. HAW. SESS. LAWS (2005); HAW. REV. STAT. § 226-1 (2008).

123. HAWAII 2050 SUSTAINABILITY PLAN, *supra* note 112.

124. HAW. REV. STAT. § 226-4 (2008).

number of specific goals and proposals. It proposes an implementing entity, "the Sustainability Council," that would be a non-regulatory body that would "promote sustainability, determine intermediate and long-term benchmarks, measure success, coordinate cross-sector efforts and dialogue, and report to government and private sector leaders on progress." The Plan purports to provide "over-arching [s]tate goals" to guide the counties in developing sustainable practices. Of the nine "priority actions" for which the Plan suggested benchmarks, two have major implications for land use: (1) increasing affordable housing; the Plan estimates that between 2007 and 2011, there is a need for 23,000 affordable housing units; and (7) increasing production of local foods and products.¹²⁵ The state's use of incentive programs and regulations to encourage agriculture will likely continue to have land use implications for the foreseeable future.

Hawai'i's land use system and complicated interlocking planning schemes are still evolving. The release of the Hawai'i 2050 Sustainability Plan, though it speaks mainly in generalities, is the first return to comprehensive state planning since the early 1980s. The Sustainability Plan may mark the beginning of a revival of state comprehensive planning. Recent legislation reveals a renewed interest in land use issues by the state legislature and a willingness to try new ideas. The agricultural land swap scheme promises new opportunities for rational development of Hawai'i's islands.

IV. CONCLUSION: A REVOLUTION WHICH HAS RUN ITS COURSE

First, it is worth observing that Hawai'i's system of broadly deciding what land should be developed and what should not has been effective in preserving open land, whether in agriculture or in conservation uses, as well as preventing sprawl beyond existing areas for development, throughout the state, and in particular on O'ahu, the locus of the City and County of Honolulu, and the home of eighty percent of the state's permanent residents. This is obvious from even the most cursory glance at land use maps from the early 1970s and those from the 1990s, the period of most growth and development in Hawai'i. That said, the system is anything but problem-free.

A. Open Space: Use of Rural & Agricultural Lands and Definition of Farm Dwellings

The Land Use Law provides little concrete guidance about what constitutes sufficient agricultural use and farm dwellings to

125. HAWAII 2050 SUSTAINABILITY PLAN, *supra* note 112, at 63-67.

qualify as permitted cases in the State Agricultural Classification. Moreover, all four of Hawai'i's counties have for two decades permitted so-called "fake farms"—large-lot residential developments with some associated agricultural uses either on or off such large lots, and they have done so with no significant objection either from the Land Use Commission or the state legislature. It should therefore have surprised no one that the much maligned Hokulia resort/residential development on the Big Island sought, and successfully obtained, county permits to commence such development on state agriculturally classified land. Nor did the settlement of the ensuing litigation before the State Supreme Court could render a decision contribute to any certainty. The Hokulia developer simply followed the practice in the industry as the court has previously held it was entitled to do, all in accordance with a well-drafted and executed development agreement. The attempt to change the rules in the middle of the game (as was duly noted and reported in *The Wall Street Journal*) sent a most unfortunate message to developers both in and out of the state about the security of land entitlements in Hawai'i.

In addition, there is the matter of open space preservation. The current Important Agricultural Lands statute has the capacity to do much to ease the necessary conversion of poor agricultural land (recall our State Land Use Law specifically permits so classifying land even if it is lava-flowed or so thinly soiled that it is demonstrably useless for agricultural purposes) to some kind of economically beneficial use (as required by the Fifth Amendment to the U.S. Constitution as interpreted by the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council*). However, the notion persists that agricultural land can continue to be regulated for open space preservation under the guise of protecting conservation and agricultural values even when neither is transparently possible.

This is true with the state's conservation zone as well. An example stems from the application of the U.S. Endangered Species Act to that zone. The Act is designed to protect plant and animal species listed by the U.S. Fish and Wildlife Service as endangered. Despite propaganda by various environmental activist groups, the listing goes well beyond cute-looking wolf or fox cubs, lovely wildflowers, or stands of stately Redwoods. The list in Hawai'i also includes tiny blind cave spiders and cephalopods. It is to protect the latter that nearly one-quarter of the island of Kaua'i was originally designated as "critical habitat" by the U.S. Fish and Wildlife Service in the 1990s. While the federal statute by its terms prohibits only certain federal activity in such designated habitat, our State Land Use Law requires our State Land Use Commission to designate land in the restrictive

conservation district for the protection of endangered species, and then requires the State Department of Land and Natural Resources, through its governing Land Board, to place such land in the most restrictive of its four subdistricts. The result is almost certainly to prevent all economically beneficial use of such land, resulting in a total regulatory taking of the subject property and requiring compensation as if the land were condemned by government. This is not only just plain wrong, but also almost certainly is an unconstitutional regulatory taking of private land without compensation, as more fully described below.

B. Regulatory Takings After Lingle v. Chevron

While the 2005 *Lingle v. Chevron* case was about gas stations and gas prices, a unanimous U.S. Supreme Court took the occasion to deliver a tutorial on takings jurisprudence, both regulatory and physical. In particular, the Court reiterated two key standards applicable to land development regulations, whether at the state or county level, based on previous holdings:^{126,127}

If a regulation deprives a landowner of “all economically beneficial use,” then the Court will treat it as if government condemned the property. There is no defense of necessity or harm prevention available. Only if government is codifying common law nuisance or basing its law on some “background principle of a state’s law of property” such as custom or public trust can government escape the requirement to pay the landowner for that deprivation.

If a regulation only partially deprives a landowner of economically beneficial use, then the court must examine the character of the governmental regulation and its economic effect on the landowner, and in particular whether the law frustrates the distinct or reasonable investment-backed expectations of the regulated landowner.

An example under Honolulu’s LUO occurs with respect to development in the ordinance’s Preservation 2 zoning category. As noted above, it is not constitutional for a regulation to deprive a landowner of all economically beneficial use of his or her land. However, the only permitted uses in this P-2 zone are vacation cabins and golf courses. But a small tract of P-2 cannot support the latter, and the former are permitted only as accessory uses to outdoor recreational principle uses. Indeed, the use of a ridge parcel so classified for vacation cottages has been denied by the Director of the DPP on just such grounds: they appear to be a principal use, rather than an accessory use, and the parcel is too small to support a golf course. The situation raises total regulatory

126. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

127. *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 123 (1978).

takings problems, as a matter of constitutional law. The same is almost certainly true for the state conservation zone (over forty percent of the state land area) in which virtually no economically beneficial uses are permitted.

C. Land Development Conditions

Coupled with the land development permit process as it presently exists, government imposes onerous conditions, often illegally, at the land reclassification stage, which lack either nexus or proportionality to a particular development. It is fair to require the land development community to bear a proportionate share of the costs of public facilities like public schools and parks and infrastructure, such as streets, water, and sewer systems generated by a new development. However, it is neither fair nor legal to foist “catch-up” infrastructure or social costs upon a particular project which have virtually no effect upon such costs. A prime example is the affordable housing requirement that the LUC requires as a condition of boundary amendment. First, a land reclassification is the wrong place to exact any land development conditions to ameliorate needs generated by a development, based on the simple reason that there is no development yet contemplated. Second, there is neither nexus nor proportionality. Every court which has rendered an opinion on such housing requirements has required such a connection, particularly, and (for Hawai‘i) most relevantly, the State of California and the 9th Circuit Court of Appeals.¹²⁸

Indeed, the matter of workforce/affordable housing exactions may well come to a head in Hawai‘i over a most unusual State Land Use Commission decision this past year to “revert” a boundary amendment reclassification of land from urban, which would have permitted a residential development and golf course coupled with some commercial development under the then-applicable county zoning code (which takes effect, recall, only on state-classified urban land). Apparently, fed up with years of delay in the commencement of the project, and despite the construction of a substantial number of affordable housing units *before* the market-rate houses, the LUC first issued a statutorily-permitted “show cause” order asking why the property should not be reclassified back to its original agricultural classification (which would render all county permissions and zones moot unless rights thereto had vested), and then unaccountably reclassified the

128. *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991); *Bldg. Indust. Ass’n of Cent. Cal. v. City of Patterson*, 90 Cal. Rptr. 3d 63, 72 (Cal. Ct. App. 2009); *San Remo Hotel, L.P. v. San Francisco*, 364 F.3d 1088, 1097-98 (9th Cir. 2004).

property without all the hearings and findings required by statute for such boundary amendment reclassifications. The case is now in federal court where the fairness of the housing exaction on a largely residential project is now an issue, together with the procedural and substantive issues raised in the LUC's abrupt reclassification. Given the LUC specifically found in an earlier hearing on the original reclassification from agricultural to urban, that the land was wholly unsuited for agricultural use (it is more or less barren old lava flows) the case will likely call into question the state classification system as well.

D. The Endangered State of Comprehensive Plans and Planning

Hawai'i is, or was, a land planning state. There is a statutory state plan, functional plans, county comprehensive general and development plans, and neighborhood plans, all calling for certain uses of land, and all, theoretically, with the force of law. Indeed, the Hawai'i Supreme Court so held in two 1989 decisions.¹²⁹ Not so today.

First, the state legislature confounded its own agency, the Hawai'i Community Development Authority ("HCDA"), by reversing the approval of a carefully designed land development project replete with a native Hawai'ian cultural performance venue and massive privately-funded environmental clean-up project of the site, all in accordance with a carefully drafted plan and after months of hearings on both plan and project. It then stripped the same HCDA of its authority to undertake or approve most developments in that part of its jurisdiction, Kakaako, located near Ala Moana Boulevard. This area was also set out in the aforesaid plan. Second, our State Water Commission and Supreme Court unaccountably dispensed with the mandatory language in both a state water plan and applicable county general and development plans to radically alter the assignment of water rights from the Windward side of O'ahu to the Leeward side. In so ignoring the plans, the court favored native Hawai'ian and water conservation uses over economic uses, an inversion of the applicable statutory hierarchy, as set out in the State Water Code.¹³⁰

Most recently, a coalition of groups has attacked a long-planned, multi-phase residential project in the Ewa District even though the city and county plans for such a project have been in place for some time. So far, the State Land Use Commission has rejected the landowner's petition for the necessary boundary

129. *Kaiser Haw. Kai Dev. Co.*, 777 P.2d at 248; *Lum Yip Kee, Ltd.*, 767 P.2d at 820.

130. *Callies & Chipchase*, *supra* note 117, at 93-94.

amendments from agriculture to urban use classification, on the plausible ground that the application fails to adequately address with precision the timing of the development phases. While the project is proposed on useful, and presently used for, agricultural land, five former Honolulu planning directors have publicly written in a daily newspaper to point out the apparent conflict between housing and agriculture, and how that conflict was resolved in official plans and planning.

E. The Issue of Native Hawai'ian Traditional and Customary Rights

Claims of Native Hawai'ians to certain lands ceded by the government that succeeded Queen Lili'uokalani to the United States upon annexation of Hawai'i as a territory of the United States at the end of the nineteenth century have roiled the state for at least the past two decades. The nub of the issue is whether the United States had sufficient title to such lands to return them legally to the State of Hawai'i shortly after statehood, and if so, whether the state was the proper returnee. Many Native Hawai'ians maintain that the Queen's government was illegally overthrown, the transfer of ceded lands to the United States was also illegal, and, therefore, the transfer back to the state is legally ineffective as well. The State of Hawai'i takes issue with at least the last two assertions and maintains that, in any event, the vote for statehood cured past legal problems, if any. The state has been negotiating, largely through the state entity, the Office of Hawai'ian Affairs ("OHA"), on the matter of title to, and income from, ceded lands for the past ten years. OHA rejected most settlement offers and appeared determined to maintain an all-or-nothing position. The matter came to something of a head following a decision by the State Supreme Court. The court's ruling was largely, if not exclusively, based upon the Apology Resolution passed by Congress during the Clinton administration, forbidding the state to deal in ceded lands until Native Hawai'ian claims are resolved, which could be years or decades. Given that the Apology Resolution is supposed by many to have no legal effect (indeed, at least one member of our senatorial delegation has so stated on the floor of the Senate), and the resolution also so states, it is hardly surprising that the state and many of its citizens strongly disagreed with both the decision and its basis, resulting in a successful petition for a hearing before the U.S. Supreme Court. Early in 2009, the U.S. Supreme Court ruled, in a relatively brief but surprisingly unanimous opinion, that the Apology Resolution is just that; an apology, without so much as a scintilla of legal effect on the rights of Native Hawai'ians. Acknowledging that there may well be moral obligations resulting from the

manner in which the territorial government was established following the precipitous ending of the Hawai'ian monarchy, the Court disposed of any notion that the resolution conferred any rights against the federal or the state government. The Court also strongly hinted that the conferring of statehood, after a popular vote overwhelmingly favoring it, might well dispose of many claims as a matter of law. While there is some sentiment for finding independent state grounds to prevent the sale of ceded lands until the resolution of Native Hawai'ian claims, and while there are presently bills in the state legislature that may, with certain exceptions, so provide, these are by no means free from legal issues; legal challenges are a virtual certainty, likely on Fourteenth Amendment due process and equal protection grounds. There is also the small matter of the state/federal admission legislation, which places the ceded lands in trust for five purposes: education, agriculture, public improvements, public use, and Native Hawai'ians. In an unpublished memorandum (and presumably unanimous) opinion fifteen years ago, the State Supreme Court handily disposed of the notion that any of the five purposes takes precedence over all of the other four, and specifically held that the state could dispose of ceded lands so long as the proceeds were traceable and accounted for among the said five purposes or beneficiaries. It is difficult to see what, on the legal landscape, has changed, except for the Apology Resolution, now legally a very dead letter.

F. Burials

A study of historical and cultural land use and regulation in Hawai'i cannot be complete without a review of those governing Native Hawai'ian *iwi* (bones) and burials that are found throughout the Islands. Indeed, between 1991 and 2000, nearly three thousand sets of Native Hawai'ian remains have been discovered and reinterred.¹³¹ Any land development must stop when such sites are discovered.¹³² Failure to comply with the relevant statutory provisions may result in civil, administrative, and criminal penalties.¹³³ Furthermore, if such finds occur on federal or tribal lands, the 1990 federal Native American Graves Protection and Repatriation Act ("NAGPRA") also applies.¹³⁴

According to Native Hawai'ian tradition, the bones of family members possess "mana," or spiritual power.¹³⁵ Unlike human

131. LISA WOODS MUNGER, HAWAII ENVIRONMENTAL LAW HANDBOOK, HONOLULU: GOV'T INSTS. 400 (3d ed. 2000).

132. HAW. REV. STAT. § 6E-43.6(g).

133. *Id.* §§ 6E-11, -73.

134. 25 U.S.C. § 3001 (2008); 43 C.F.R. §§ 10.3-10.7 (2008).

135. MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN HANDBOOK 246-

flesh, which decays, the bones of the dead allegedly contain the spirit of the deceased and transfer their power to their living Hawai'ian descendants."¹³⁶ This belief is reflected in Hawai'ian proverbs:

'A'ohe e nalo ka iwi o ke ali'i 'ino, o ko ke ali'i maika'i ke nalo.

The bones of an evil chief will not be concealed, but the bones of a good chief will.

When an evil chief died, the people did not take the trouble to conceal his bones.¹³⁷

While Native Hawai'ians once buried their dead in graveyards, "wicked, traitorous, and desecrating chiefs" regularly exhumed fresh corpses to use the flesh as food and shark bait and to fashion the bones into arrows and fishhooks.¹³⁸ Thereafter, Hawai'ians concealed their dead without identifying the sites.

Sand was the preferred location for burials because it better preserved remains than higher, wetter elevations.¹³⁹ Therefore, coastal areas with subsurface beach sand are likely to contain *iwi*.¹⁴⁰ "[T]he confidentiality of description and location information, especially for burial and other cultural sites, is a highly sensitive issue [in] the Hawaiian community. The final resting place of the ancestors of Native Hawaiians has always been sacred and consequently, hidden to protect its sanctity."¹⁴¹ Hence, burial secrecy lies at the heart of the state's burial statutes. The watershed event that resulted in legislative language to protect ancestral bones occurred in 1988, during the construction of the Ritz-Carlton at Honokōhau in Kapalua, Maui. The unearthing of approximately one thousand sets of remains caused an uproar in the Native Hawai'ian community. Activists immediately protested the development and, after a \$6 million settlement that included the relocation of the hotel to another parcel, the state legislature amended Chapter 6E of the Hawai'i Revised Statutes to include burial sites as part of its historical and

49 (Univ. of Hawai'i Press 1991).

136. *Id.*

137. MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS (Bishop Museum Press 1983).

138. See SAMUEL MANAIKALANI KAMAKAU, TALES AND TRADITIONS OF THE PEOPLE OF OLD (Bishop Museum Press 1991).

139. See Sean Hao, *Ancient Burials Likely in Transit Path*, HONOLULU ADVERTISER, June 22, 2008, at A13, <http://the.honoluluadvertiser.com/article/2008/In/hawaii806220357.html> (quoting Thomas Dye, president of the Society for Hawai'ian Archaeology).

140. *Id.*

141. Comm. on Water, Land, and Haw. Affairs, Standing Comm. Rep. 2868, 20th Leg., Reg. Sess., at 1 (2000) (re: H.B. 2762).

cultural preservation provisions.¹⁴²

Central to the enforcement of burial site regulation is the DLNR's State Historic Preservation Division ("SHPD"). One may not so much as photograph remains without SHPD's approval.¹⁴³ Indeed, SHPD is involved even if the private owner or developer is not, at least directly. "Before any agency or officer of the [s]tate or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect . . . a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity for review and comment on the effect of the proposed project."¹⁴⁴

SHPD responds primarily to "inadvertently discovered" burial remains, defined as "the unanticipated finding of human skeletal remains and any burial goods resulting from unintentional disturbance, erosion, or other ground disturbing activity."¹⁴⁵ Upon discovery of a potentially historic burial site, SHPD requires that it, the medical examiner, and the appropriate police department be notified as soon as possible.¹⁴⁶ A qualified archaeologist and a medical examiner must examine the remains to determine whether the remains are over fifty years old.¹⁴⁷ Once SHPD is contacted, administrative procedures require a response time of twenty-four hours on O'ahu, forty-eight hours on other islands, and an additional twenty-four hours if multiple sets of remains are reported to determine if the burial is historic.¹⁴⁸ If the bones are of animal origin, then no statutory obligations are incurred. However, if the remains are over fifty years old and of Native Hawai'iian ancestry, then SHPD must begin gathering information about the history of the burial and determine whether the remains will be preserved in place or relocated.¹⁴⁹ If the remains were discovered with no relation to a planned development project, SHPD must prepare a mitigation plan requiring "appropriate treatment . . . of burial sites or human skeletal remains."¹⁵⁰ However, if the discovery of remains was related to a planned development project, the landowner must prepare the mitigation plan with the concurrence of SHPD.¹⁵¹ The process often raises

142. HAW. REV. STAT. §§ 6E-3(3), (10), (11).

143. HAW. CODE. R. § 13-300-32.

144. HAW. REV. STAT. § 6E-42(a) (emphasis added).

145. HAW. CODE. R. § 13-300-2.

146. HAW. REV. STAT. § 6E-43.6(b).

147. *Id.* § 6E-43.6(c). If the remains are not over fifty years old, the medical examiner must investigate, and SHPD's involvement at the burial site ends.

148. *Id.*

149. *Id.* § 6E-43.6(c)(2).

150. *Id.* § 6E-43.6(e)(3).

151. *Id.* § 6E-43.6(e)(1).

concerns in the Hawai'ian community because "developers may conduct cursory archaeological inventory surveys, claim that burials are 'inadvertently discovered,' and then attempt to force SHPD to agree to removal/relocation."¹⁵² When it comes to land development in Hawai'i, inadvertent discoveries of Native Hawai'ian burial sites usually lead to controversy and consequent delays in a project.¹⁵³

The determination to preserve a burial site in place or relocate remains may be based upon the advice of an Island Burial Council ("IBC"), which DLNR establishes to advise both the department and SHPD regarding burial matters.¹⁵⁴ IBCs exist for the following five districts: Hawai'i, O'ahu, Kaua'i/Ni'ihau, Moloka'i, and Maui/Lana'i.¹⁵⁵ Comprised of between nine and fifteen members appointed by the governor, each council is charged with making an inventory of burial sites in Hawai'i.¹⁵⁶ The councils retain jurisdiction over all requests to preserve or relocate "previously identified" Native Hawai'ian burial sites, while SHPD has jurisdiction over those burial sites that are determined to hold remains of non-Native Hawai'ian origin.¹⁵⁷ "Previously identified" burial sites are those "containing human skeletal remains and any burial goods identified during archaeological inventory survey and data recovery of possible burial sites, or known through oral or written testimony."¹⁵⁸ IBCs often hold regular public meetings where they collect information and testimony from Hawai'ians in order to "previously identify" burial sites.¹⁵⁹ The archaeological inventory survey identifies and documents the historic sites in the project area, including subsurface excavations, to determine the location of burial sites.¹⁶⁰ Due to the inherent nature and sensitivity of the burial sites, IBCs often keep the locations confidential and unrecorded in the public records of DLNR's public records.¹⁶¹

If Native Hawai'ian remains are discovered in an area where burials have been previously identified, the remains may not move them without SHPD's approval.¹⁶² SHPD refers the matter to the

152. Lisa A. Bail et al., *Emerging Environmental and Land Use Issues*, 9-June HAW. B.J. 4 (2005).

153. *Id.*

154. HAW. REV. STAT. § 6E-43.5(d).

155. *Id.* § 6E-43.5(a).

156. *Id.* §§ 6E-43.5(b), (f).

157. See HAW. CODE. R. §§ 13-300-33, 13-300-34 (describing the duties and responsibilities of the councils and the SHPD).

158. *Id.* § 13-300-2.

159. *Id.* § 13-300-31(a).

160. *Id.* §§ 13-276-3 to 5.

161. HAW. REV. STAT. § 6E-43.5(e).

162. See *id.* § 6E-43(a) (excluding "known, maintained, [and] actively used

appropriate IBC, which then determines whether the remains will remain undisturbed or if they will be reinterred at a different location.¹⁶³ The councils are more likely to recommend preservation for “areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals and events, or areas that are within a context of historic properties, or have known lineal descendants.”¹⁶⁴ The relevant IBC has forty-five days, commencing with the date that SHPD makes a referral to it, to render a determination regarding the disposition of the remains.¹⁶⁵ The IBC must also make a good-faith effort to give notice of any proposed burial treatment plan to the possible lineal or cultural descendants of the remains.¹⁶⁶

If the IBC determines that the burial site should be preserved in place, the applicant must then develop a preservation plan providing for both short-term and long-term preservation of a burial site.¹⁶⁷ When the IBC determines to relocate the burial site, the landowner must complete an archaeological data recovery plan outlining the reasons for relocation, the methods for disinterment, and the location and manner of reinterment.¹⁶⁸ The SHPD then has ninety days to approve of the archaeological data recovery plan.¹⁶⁹ Moreover, SHPD must first consult with the applicant, any known lineal descendants, the IBC, and any appropriate Hawai'iian organizations before approving the plans.¹⁷⁰ After the SHPD approves the final plans to preserve or reinter, it must record the IBC's determination with the Bureau of Conveyances to ensure that the burial sites are protected in perpetuity.¹⁷¹

There are several locations in Hawai'i in which the state's burial laws have delayed development projects, including the site of a Wal-Mart and a Whole Foods Market on O'ahu, a luxury golf-residential development on the Big Island of Hawai'i, and private residences on Maui. Most recently, sixty-nine Hawai'iian remains discovered during earthmoving for the construction of a \$17.5 million multipurpose center on the grounds of Honolulu's famous and largely Native Hawai'iian-attended Kawaiaha'o Church, has resulted in a temporary halt in construction due to “one of the

cemeter[ies] from the category of burial sites which need the SHPD's approval before relocating any remains that appear to be over fifty years old).

163. *Id.* § 6E-43(b).

164. *Id.*

165. *Id.*

166. HAW. CODE. R. § 13-300-33(b)(1).

167. *Id.* § 13-300-38(e).

168. *Id.* § 13300-38(f).

169. *Id.*

170. *Id.* §§ 13-300-38(e)-(i).

171. *Id.* § 13-300-38(g).

largest graveyard intrusions on O'ahu."¹⁷² An archaeologist hired by an interested third party found that the excavation is also encroaching on the burial plot of one of Hawai'i's prominent figures, Queen Kapi'olani.¹⁷³ The project halted while the church supplied the state with "documentation on past burials, conduct[ed] hand excavations of newly discovered remains and develop[ed] a detailed reburial plan for bodies that [have been] unearthed."¹⁷⁴ The church was also required to use ground-penetrating radar to examine the property for additional burials that might not yet have been disturbed.¹⁷⁵

Earlier, a huge controversy erupted on Kaua'i over remains on a single residential lot. On December 11, 2007, the Kaua'i County Planning Commission approved the construction of a single-family home on a lot in Ha'ena, conditioned on an archaeological survey of the land and a subsequent approval by the SHPD.¹⁷⁶ The archaeological survey uncovered thirty sets of Native Hawai'ian remains on the half-acre lot. SHPD then required the landowner to draw up a burial treatment plan for protecting the remains.¹⁷⁷ The plan proposed preservation in place of twenty-four sets of remains that would not be impacted by the construction and on-site relocation of the six others that would be under the footprint of the proposed house.¹⁷⁸

Upon receiving the burial treatment plan, however, the Kaua'i/Ni'ihau IBC recommended that all thirty sets of remains, together with those that may be found on the property in the future, should be preserved in place.¹⁷⁹ The landowner then revised the burial treatment plan to preserve all thirty remains in place, by capping the graves with cement blocks and adding vertical buffers to protect the human remains.¹⁸⁰ After consulting with Native Hawai'ian organizations and the Kaua'i/Ni'ihau IBC, SHPD approved the plan,¹⁸¹ though it apparently approved the vertical buffers and concrete cappings as a means of preservation

172. Rick Daysog, *Kawaiaha'o Church Center's Fundraising Costs Questioned*, HONOLULU ADVERTISER, May 29, 2009, at A1-A2.

173. Rick Daysog, *OHA Asks for Study of Burials*, HONOLULU ADVERTISER, June 9, 2009, at B1.

174. Rick Daysog, *Church Project in Need of Disinterment Permit*, HONOLULU ADVERTISER, June 13, 2009, at B1.

175. *Id.*

176. Order Granting in Part and Denying in Part Defendant's Motion for Preliminary Injunction at 2, *Brescia v. Edens-Huff*, No. 08-1-0107 (2008).

177. *Id.* at 2-3.

178. *Id.* at 3.

179. *Id.*

180. *Id.*

181. *Id.*

of the remains without the approval of the Kaua'i/Ni'ihau IBC.¹⁸² As the burial statute presently provides, although the IBCs have the authority to determine the preservation or relocation of previously identified Native Hawai'ian burials, the councils may only make recommendations regarding the appropriate management treatment and protection of the Native Hawai'ian burial sites after making their initial determination.¹⁸³

For burials "excavated intentionally or discovered inadvertently" on federal lands in Hawai'i and Hawai'ian Home Lands, NAGPRA applies. NAGPRA mainly deals with three issues: (1) the custodial priority of the cultural items excavated or discovered to the organizations or descendants who lay claim to them; (2) the process by which intentional removal of cultural items are allowed; and (3) "inadvertent discoveries" of native remains and objects.¹⁸⁴ Regulations promulgated by the Department of the Interior then govern the process by which "human remains, funerary objects, sacred objects, or objects of cultural patrimony are excavated or removed."¹⁸⁵ For the latter two, and for any event in which a Native Hawai'ian organization is likely a consulting party, the rules require that "the responsible Federal agency official must" notify said organizations in writing in addition to any other communication that may have occurred.¹⁸⁶

In general, the federal mandates are similar to those of the state, requiring the immediate cessation of activity in the case of inadvertent discoveries and the consent of Native Hawai'ian organizations in the case of intentional excavations.¹⁸⁷ There is at least one difference, however. Whereas an IBC can require the preservation of bones as-is and where-is on state and private lands, site activity *may* resume within thirty days on federal lands "after certification by the notified Federal agency of receipt of the written confirmation of notification of inadvertent discovery if the resumption of the activity is otherwise lawful."¹⁸⁸ The presumption is that state burial regulations do not apply to federal lands. Instances of removals or excavations are not an issue because these are explicitly covered in the NAGPRA regulations.¹⁸⁹ Federal agencies are encouraged to come to an agreement with local

182. Indigenous Mapping Network, *Kanaka Maoli Scholars Against Desecration – Second Statement on Naue*, Mar. 24, 2009, <http://indigenoumapping.net/newitem.html?start=25> (scroll down to "Kanaka Maoli Scholars Against Desecration").

183. HAW. REV. STAT. § 6E-43.5(f).

184. 25 U.S.C. §§ 3002(a)-(d).

185. 43 C.F.R. § 10.3(c)(4)(i).

186. *Id.* §§ 10.3(c)(1), 10.4(d)(1)(iii), 10.5(b)(1).

187. *Id.* §§ 10.4(c), 10.3(b)(2).

188. *Id.* § 10.4(d)(2).

189. *Id.*

organizations with respect to human remains and other sacred objects.¹⁹⁰

G. Sacred Sites

Sacred sites, or *wahi pana*, are also important to the Native Hawai'ian community. According to Native Hawai'ian belief, sacred places, like human remains, possess "mana," or spiritual power in connection with the gods or important chiefs that may have resided there, the events or natural phenomena that occurred there, or the usefulness or aesthetic value of the location.¹⁹¹ "[Hawai'ian sacred places] are more than remnants of a distant past; they are enduring reminders of Hawaiian identity, a rich heritage left by kapuna."¹⁹² Native Hawai'ians are spiritually connected to these sacred places, linking them to their past, present, and future.¹⁹³

Native Hawai'ians believe that such sites can be irreparably harmed physically as well as spiritually; the mere visitation of certain locations or touching of certain objects could cause the sacred spirits to be destroyed or to leave the site.¹⁹⁴ The destruction or departure of spirits from *wahi pana* is said to be detrimental to the Native Hawai'ian culture. There are many examples in Hawai'i where the Native Hawai'ian community has tried to protect their sacred sites. In 2007, challenges by environmental and Hawai'ian groups temporarily halted plans for the Outriggers Project, a \$50 million addition to the W. M. Keck Observatory on Mauna Kea's summit.¹⁹⁵ Mauna Kea is allegedly sacred to the Hawai'ian people not only as a place of worship and prayer, but also because Hawai'ian legend suggests it was here that the first ancestors of the Hawai'ian people, Papa and Wakea, met.¹⁹⁶

A court reversed a decision by DLNR that granted a conservation district permit allowing the University of Hawai'i Institute for Astronomy to proceed with the Outriggers Project.¹⁹⁷ It ordered the completion of a comprehensive management plan before any project could proceed, stating "the resource that needs

190. *Id.* § 105(f).

191. VAN JAMES, ANCIENT SITES OF O'AHU xi (Bishop Museum Press 1991).

192. JAN BECKET & JOSEPH SINGER, PANA O'AHU: SACRED STONES, SACRED LANDS xxvi, xxvii (Univ. of Hawai'i Press 1999).

193. JAMES, *supra* note 191, at ix.

194. BECKET & SINGER, *supra* note 192, at xxvii.

195. Kevin Dayton, *Big Push to Erect Telescope in Isles*, HONOLULU ADVERTISER, Aug. 10, 2008, at A1.

196. *Id.*

197. Mauna Kea Anaina Hou v. DLNR, Civ. No. 04-1-397 (D. Haw. Aug. 3, 2006).

to be conserved, protected and preserved is the summit area of Mauna Kea, not just the area of the Project.”¹⁹⁸

While not perfect, historic preservation is alive and well in Hawai'i. The state's legislative protection has been strengthened over the years, and there are some linkages to other laws that are variously triggered when a historic site is listed and that provide a measure of protection to certain sites. But the state could do more, especially given the constitutional mandate that other states with stronger preservation laws lack. Indeed, Hawai'i is in the minority of states that fail to provide rehabilitation tax credits for historic buildings.¹⁹⁹ It is the counties that play a major role in enacting ordinances with the most promise for preserving Hawai'i's historic heritage. Witness two of the four counties' "certified local government" status and the Big Island's Hawai'i Heritage Corridor program. Given the strong language of the *Penn Central* decision from our nation's highest court upholding historic preservation restrictions prohibiting demolition altogether, it is clear that there would be no legal barriers to more forceful implementation of our state constitutional mandate that "private property *shall* be subject to reasonable regulation" in order to "conserve and develop objects and places of historic or cultural interest."²⁰⁰

198. *Id.* at 7.

199. See Harry K. Schwartz, *State Tax Credits for Historic Preservation*, NAT'L TRUST FOR HISTORIC PRES., <http://www.preservationnation.org/issues/rehabilitation-tax-credits/additional-resources/state-tax-credits-chart-5-20-2011-2.pdf> (last updated May 2011) (showing that thirty states have tax credits for historic preservations and Hawai'i is not among them).

200. HAW. CONST. art. IX, § 7 (emphasis added).